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No. 90-327

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, NANCY A. HIORTDAHL and DON LUHRSEN,
Petitioners,

v.

TELLY KANAKIS and PATRICIA KANAKIS,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The American Council of Life Insurance ("ACLI") and the Health Insurance Association of America ("HIAA") hereby respectfully move for leave to file the attached brief *amici curiae*. The questions presented are issues of great importance under The Employee Retirement Income Security Act of 1974 (ERISA), in which *amici*, as well as ERISA plan beneficiaries and sponsors, are vitally interested. *Amici* have sought permission of the parties to file this brief. Petitioner has consented; respondent has refused consent.

Amici are the largest life and health insurance trade associations in the country. HIAA represents the interests of over 300 member companies, which underwrite or administer more than 85 percent of the health and disability insurance written by insurance companies in the United States. Over 90 million Americans are covered by insurance provided by HIAA members, primarily through employee benefit plans. ALCI represents the interests of over 600 member life insurance companies, which presently hold approximately 94 percent of the life insurance in force in legal reserve life insurance companies in the United States, much of which is issued to or through employee benefit plans.

The questions presented in the instant case are of substantial importance to ACLI and HIAA and their member companies, and to ERISA plan sponsors, participants and beneficiaries nationwide. The decision of the California Court of Appeal is the latest in a series of similar decisions by the California appellate courts which misconstrue this Court's precedent and other federal statutory and case law. These cases have significant consequences for all parties to insured employee benefit plans; they give employers total control, depending on their subjective intent and their choice whether to delegate administrative duties, over whether their plans will be subject to federal regulation.

The brief submitted by ACLI and HIAA urges this Court to grant *certiorari* to settle two important questions of federal law upon which the court below reached the wrong conclusions: (1) whether an employer must be directly and actively involved in the administration of an employee welfare benefit plan for such a plan to be subject to regulation under ERISA, or whether an employer may delegate administrative responsibility to an insurer or other third party without evading federal regulation, and (2) whether an employer must evidence an intent to establish a plan governed by ERISA for a

welfare benefit plan to be subject to federal regulation. To date, the California courts of appeal's answers to these questions conflict with federal law and threaten to disrupt the uniform national scheme of federal regulation of employee benefit plans that was intended by Congress when it enacted ERISA.

The insurers represented by HIAA and ACLI have a vital interest in the outcome of this case. HIAA and ACLI can provide the Court with a broad perspective on the issues by virtue of their extensive involvement in ERISA employee welfare benefit plans nationwide. They have provided this Court with *amicus* briefs in recent cases concerning other important issues under ERISA, for example *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). They respectfully request permission to file their brief as *amici curiae*.

Respectfully submitted,

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BRIEF AMICI CURIAE OF AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA

INTEREST OF AMICI

The interest of *amici* American Council of Life Insurance and Health Insurance Association of America is set forth in their accompanying Motion for Leave to File Brief as Amici Curiae.

SUMMARY OF ARGUMENT

This Court should grant *certiorari* in this case to settle two important questions of federal law under The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Sections 1001, *et seq.* The first question, whether an employer must be actively involved in the administration of an insured employee welfare benefit plan in order for the plan to be subject to federal regulation under ERISA, arises from the consistent mis-

interpretation by California courts of appeal of this Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). California courts, including the court below, have erroneously extracted from *Fort Halifax* a rule that an insured employee welfare benefit plan is not governed by ERISA unless the employer is directly and actively involved in the administration of the plan. This requirement was not articulated by this Court in *Fort Halifax*, and is inconsistent both with the tests for ERISA coverage articulated by the federal courts of appeals, *see*, e.g., *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982), and with the regulations promulgated under ERISA by the Department of Labor, 29 C.F.R. 2510.3-1(j), which permit employers to delegate administration of such plans to insurers or other third parties. This Court should grant *certiorari* in order to resolve this important question raised by the lower courts' misunderstanding of *Fort Halifax*.

This Court should address the second question, whether an employer must evidence an intent to establish an ERISA plan in order for ERISA to govern the plan, to resolve a conflict between the California Court of Appeal and the majority of federal courts of appeals, and to close a potentially major loophole in the application of ERISA to employee benefit plans. If the employer's subjective intent is a test of whether ERISA governs the plan, employers will be free to "opt out" of ERISA coverage simply by ignoring its dictates or deciding that they do not elect to have ERISA coverage. This would contravene one of the principal purposes of ERISA, which is to protect employees and their dependents under a national scheme of federal regulation from improper or imprudent benefit plan administration. *See, Fort Halifax Packing Co. v. Coyne, supra*, 482 U.S. at 7-16.

The imposition by the California Court of Appeal of both requirements, employer administrative activity and subjective intent to be governed by ERISA, threatens to undermine the uniform, comprehensive federal regulatory

scheme that Congress sought to impose on employee benefit plans nationwide when it enacted ERISA. *See, Shaw v. Delta Air Lines Inc.*, 463 U.S. 85 (1983). This Court should grant *certiorari* in order to resolve the conflict between the California courts of appeal and federal courts, including this Court, and to settle these important questions of federal law.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO SETTLE AN IMPORTANT QUESTION OF FEDERAL LAW BY UNEQUIVOCALLY STATING THAT DIRECT EMPLOYER ADMINISTRATION OF AN INSURED EMPLOYEE WELFARE BENEFIT PLAN IS NOT NECESSARY FOR SUCH A PLAN TO BE REGULATED BY ERISA.

In an attempt to avoid ERISA preemption of employee benefit claims, the state court of appeal below, following the lead of other California appellate court opinions,[1] has misinterpreted and misapplied this Court's opinion in *Fort Halifax Packing Co. v. Coyne, supra*, erroneously declaring that direct employer administration of an insured employee welfare benefit plan is necessary to the establishment and maintenance of an ERISA plan. This Court should take this opportunity to place its imprimatur upon the reasoning of the majority of the federal courts of appeals, which have held that an employer's adoption of a group insurance plan for its employees creates an ERISA plan, so long as "from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for recovery of benefits."[2]

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[1] *Sayble v. Blue Cross of Southern California*, 88 Cal.App.3d 1108 (March 20, 1989) (Rev. den. by Cal. Supreme Ct. June 8, 1989; directed not to be published in Official Reports); *Rizzi v. Blue Cross of California*, 206 Cal.App.3d 380, 390 (1988).

[2] This imprimatur is particularly important because the state appellate courts in California are not obligated to adhere to deci-

Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982) (*en banc*). *See also Kanne v. Connecticut General Life Insurance Co.*, 859 F.2d 96, 98 (9th Cir. 1988); *Ed Miniat, Inc. v. Globe Life Insurance Group*, 805 F.2d 732, 738 (7th Cir. 1986), *cert. den.*, 482 U.S. 915 (1987); *Roe v. General American Life Insurance Co.*, 712 F.2d 450, 452 (10th Cir. 1983); and *Hermann Hospital v. MEBA Medical & Benefits Plan*, 845 F.2d 1286 (5th Cir. 1988). Despite the lower court's reliance on *Fort Halifax*, neither this Court in *Fort Halifax* nor the ERISA statute itself directly addresses any requirement of employer administration of an insured plan as a prerequisite to ERISA coverage.

In deriving from *Fort Halifax* a requirement of employer administration of insured plans, the court below has misstated and mis-analyzed the facts of that case, as well as its holding. *Fort Halifax* imposes no such requirement. *Fort Halifax* involved an employer that attempted to avoid a Maine statute requiring it to pay a one-time severance benefit to employees of plants which closed or relocated. The employer argued that ERISA preempts any state law pertaining to a type of employee *benefit* listed in ERISA, including severance benefits. This Court rejected the employer's argument for three reasons: (1) The interpretation urged by the employer was contrary to the plain language of ERISA's preemption provision, which refers not to employee *benefits* but to employee benefit *plans*. 482 U.S. at 7-16. (2) The Maine statute required only a one-time payment, and therefore it had no administrative scheme that would implicate the concerns of the preemption provision. *Id.* (3) The Maine statute did not implicate the fiduciary concerns of ERISA. This Court stated that "[o]nly

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cisions of intermediate federal courts on federal question issues, but obviously must follow a decision of this Court on such an issue. *People v. Bradley*, 1 Cal.3d 80, 86 (1969); *Debtor Reorganizers Inc. v. State Board of Equalization*, 58 Cal.App.3d 691, 696 (1976).

'plans' [as opposed to one-time benefit payments] involve administrative activity potentially subject to employer abuse." *Id.*, at 16. Since the obligation to pay a *one-time* severance benefit involved no such activity, there was no occasion for such abuse. *Id.*

Thus, the focus of *Fort Halifax* was on the difference between a *one-time* employee benefit that required no ongoing administration by *anyone*, and *ongoing* benefit plans that have an administrative scheme that may be regulated. *Fort Halifax* did not focus on, and did not purport to express, what specific administrative activities must be undertaken in order for a plan to be covered by ERISA. More importantly, *nothing* in *Fort Halifax* requires that the administrative duties be performed by the *employer*, as opposed to a third party to whom the employer may delegate them. *Fort Halifax* makes clear that the concerns of ERISA's preemption and fiduciary provisions are implicated by the *existence* of an administrative scheme, not by who administers that scheme.

The state court below, consistent with an apparent trend among the California appellate courts,[3] ignored that the benefit involved in *Fort Halifax* required no administration whatsoever, *by anyone*, and focused only on the fact that the employer in *Fort Halifax* actually per-

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[3] See, e.g., *Sayble v. Blue Cross of Southern California*, 88 Cal. App.3d 1108 (March 20, 1989) (Rev. den. by Cal. Supreme Ct. June 8, 1989; directed not to be published in Official Reports). ("[T]he existence of an ERISA plan depends on the extent to which the employer is involved in the administration of the benefit program so as to implicate the concerns which give rise to ERISA. [. . .] Due to the lack of participation by [the employer] in the administration of the subject insurance benefit, the regulatory concerns of ERISA are not implicated."); *Rizzi v. Blue Cross of California*, 206 Cal.App.3d 380, 390 (1988) ("An employer may have (but has not necessarily) established an ERISA plan if his main involvement is to contribute to the payment of premiums. [. . .] The ultimate determination depends on an evaluation of all the circumstances, keeping in mind ERISA's purpose of regulating an *employer's administration* of benefit plans.")

formed no administrative duties subject to ERISA. The appellate court's reliance on *Fort Halifax* is clearly misplaced. *Fort Halifax* simply *did not* decide nor declare that where an employer provides benefits to its employees through insurance, what would otherwise be an ERISA plan loses ERISA status if the employer delegates administrative duties to the insurer or other third party.

As Petitioners have ably pointed out in their Petition, ERISA expressly contemplates the extensive role insurers necessarily play in the administration of insured employee benefit plans and assumes that, generally, administrative duties can and will be delegated to third parties.[4] *Petition*, at 10 and 11. In addition, the regulations under ERISA expressly contemplate administration of claims by the insurer under an insured plan. For example, 29 C.F.R. Sections 2560.503-(1)(c) and (g)(2) discuss the mechanics of integrating an insurer's claim procedures with those required by ERISA, and impose fiduciary responsibility under ERISA on an insurer processing such claims.

The California courts of appeal, including the court below, are misusing this Court's opinion in *Fort Halifax* in an effort to restrict the scope of ERISA preemption of state laws relating to employee benefit plans. Moreover, the California courts are apparently unwilling to follow clear intermediate federal authority. There exists a pressing need, therefore, for this Court to grant the instant Petition for Writ of Certorari, to resolve an important question of federal law in an area where relevant federal precedent is being ignored and misapplied by the California appellate courts. That important question of federal law is whether an employer that provides welfare benefits through insurance may delegate administrative

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[4] A recent study indicates that 93% of employer-sponsored health benefit plans have claims administered by entities other than the employer, such as insurers and professional third-party administrators. 1988 Foster Higgins Health Care Benefits Survey 24.

responsibility for the plan to an insurer or third party, or whether the employer must be directly involved in administration of the plan for the plan to be subject to ERISA regulation.

II. BY REQUIRING EMPLOYER "INTENT" TO ESTABLISH AN ERISA PLAN, THE CALIFORNIA COURT HAS CREATED A LOOPHOLE IN FEDERAL LAW WHICH CONFLICTS WITH DECISIONS OF FEDERAL COURTS OF APPEALS AND WHICH WILL PERMIT EMPLOYERS TO "OPT OUT" OF ERISA COVERAGE, UNDERMINING THE UNIFORM FEDERAL SCHEME OF REGULATION ESTABLISHED BY CONGRESS.

The California court has created a remarkable, and potentially huge, loophole in federal law by requiring that an employer demonstrate an "intent" to establish an ERISA plan in order for ERISA to govern the plan. This requirement permits an employer to "opt out" of federal regulation simply by determining unilaterally that it does not "intend" to have an employee benefit plan governed by ERISA. Such a choice could effectively remove most California benefit plans from the uniform national regulatory scheme that Congress expressly articulated as its principal goal when it enacted ERISA. *See, Shaw v. Delta Air Lines Inc.*, 463 U.S. 85, 105, (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523, (1981).

This Court should grant *certiorari* in order to address this issue because the vast majority of employee welfare benefit plans could be affected if courts continue to misunderstand the fundamental concept of how an employee welfare benefit plan subject to ERISA can be established. Unfortunately, the California court's erroneous intent requirement was derived from misleading language in several federal circuit court opinions, which may continue to foster similar misperceptions and avoidance of federal regulation.

The California court misread *Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 567 F.2d 692 (7th Cir. 1977) and *Taggart v. Life & Health Benefit Administration*, 617 F.2d 1208 (5th Cir. 1980), to require that an employer intend to establish an ERISA governed plan as a prerequisite to ERISA coverage. Both of these early cases struggled with the application of ERISA to circumstances where an employer selects as the funding mechanism for health benefits a multiple-employer insurance trust that is not itself an ERISA plan.[5] Subsequent cases have clarified this question. *See*, e.g., *Hermann Hospital v. MEBA Medical & Benefits Plan*, 845 F.2d 1286 (5th Cir. 1988); *Donovan v. Dillingham*, 688 F.2d F.2d 1367, 1375 (11th Cir. 1982) (*en banc*). However, the California court, taking language out of the context of the facts and legal issues of the cases, has extracted a rule which, if followed, will make ERISA regulation of employee benefit plans optional at the whim of the employer.

The correct approach, which should be articulated directly by this Court, was stated in *Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co.*, 809 F.2d 617 (9th Cir. 1987). The Court stated,

> An employer . . . can establish an ERISA plan rather easily. Even if an employer does no more than arrange for a "group-type insurance program," it can establish an ERISA plan, unless it is a mere advertiser who makes no contributions on behalf of its employees.

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[5] No multiple employer insurance trust is involved in this case, although the choice between insurance purchased directly from an insurer and insurance purchased through subscription to a multiple employer trust is of no consequence in the determination of whether the *employer* has established an employee welfare benefit plan governed by ERISA. *See*, e.g., *Kanne v. Connecticut General Life Insurance Co.*, 867 F.2d 489 (9th Cir. 1988); *Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co.*, 809 F.2d 617 (9th Cir. 1987).

809 F.2d at 625. *See, Donovan v. Dillingham, supra,* 688 F.2d at 1373. (An ERISA plan "is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits".)

Substantial guidance in determining whether an employer that has arranged for group insurance benefits has established an ERISA-governed employee welfare benefit plan is found in regulations promulgated by the Department of Labor. 29 C.F.R. Section 2510.3-1(j). This Court has acknowledged the deference to be accorded to the reasonable regulations of the Secretary of Labor in the interpretation of ERISA. *Massachusetts v. Morash,* —— U.S. ——, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989).[6]

The Department of Labor regulations set forth four criteria, *all* of which must be present, in order for a group insurance arrangement *not* to be governed by ERISA: (1) the employer makes *no contribution* toward premiums; (2) participation by employees in the program is *completely voluntary*; (3) the employer *does not endorse* the program, and simply permits an insurer to publicize the program to its employees and collects premiums for the insurer through payroll deductions or the like; and (4) the employer receives *no consideration* in connection with the program other than reasonable compensation for its administrative costs in collecting premiums for the insurer. 29 C.F.R. Section 2510.3-1(j). *See, Kanne v. Connecticut General Life Insurance Co.,* 867 F.2d 489, 492 (9th Cir. 1988). (All four criteria

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[6] Congress specifically empowered the Department of Labor to issue regulations under ERISA, and therefore the Secretary's construction of the statute is controlling unless the promulgation of the regulation at issue was an abuse of discretion, arbitrary or capricious, or contrary to the statute. 29 U.S.C. Section 1135; *See, Batterton v. Francis,* 432 U.S. 416, 428 (1977); *Buczynski v. General Motors Corporation,* 616 F.2d 1238, 1242-43 (3rd Cir. 1980).

must be met in order for a group insurance arrangement to be exempt from ERISA coverage.)

As the *Donovan* court pointed out, in determining whether an employer's plan is governed by ERISA, the focus of the inquiry is whether the decision to establish a plan or program "has become a reality." 688 F.2d at 1373; *Ed Miniat, Inc. v. Globe Life Insurance Group, Inc.*, 805 F.2d 732, 739 (7th Cir. 1986). Where an employer has elected to provide a medical insurance plan for the benefit of its employees, has paid some or all of the premiums for that insurance, and has done more than simply permit an insurer to advertise an insurance program to its employees, the decision to establish a plan has clearly "become a reality." It is simply incorrect to conclude that a plan is not governed by ERISA because the employer was unaware that ERISA existed or determined that it did not wish to have ERISA governance. Giving the employer effective control over whether to be governed by federal regulation would permit employers, by ignorance or by design, to thwart the protections ERISA affords millions of working Americans against improper or imprudent plan administration.

It is important that this Court grant *certiorari* in this case to uphold the intent of Congress that employee benefit plans throughout the United States, including insured plans, be subject to a single, uniform, comprehensive scheme of federal regulation. In enacting ERISA, Congress was emphatic that it be broadly applied. As the Senate reported:

> It is intended that coverage under the Act be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs. Conversely, exemptions should be confined to their narrow purpose.

Senate Report No. 93-127, *reprinted in* 2 U.S. Code Cong. & Admin. News, p. 4854 (1974).

This Court should not permit employers to circumvent ERISA's broad preemptive effect, and to "opt out" of the comprehensive scheme of federal regulation enacted by Congress, simply by not "intending" to establish an ERISA-governed plan. A definitive statement on this issue is needed to stop the California courts from misconstruing federal case authority and creating a requirement that could completely eviscerate the broad application of ERISA intended by Congress.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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